

Kurina (Migration) [2018] AATA 5351 (29 October 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Martin Kurina

CASE NUMBER: 1701067

DIBP REFERENCE(S): CLF2013/83520

MEMBER: Moira Brophy

DATE: 29 October 2018

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.211 of Schedule 2 to the Regulations;
- cl.801.221 of Schedule 2 to the Regulations; and
- r.2.03A.

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made on 29 October 2018 at 3:18pm

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CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine de facto relationship – residing together for over seven years – flatmates – nature of household – some inconsistencies in the evidence – decision under review remitted

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LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 801.211, 801.221

Statement

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 3 January 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 17 April 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the parties were in a genuine and continuing relationship.
5. The applicant, Mr Martin Kurina appeared before the Tribunal on 4 April 2018 and on 8 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Veronika Stepnickova. The Tribunal hearing was conducted with the assistance of an interpreter in the Czech and English languages.
6. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

8. *Background*

9. The applicant was born on 24 December 1976 in Prague, Czech Republic. He has not declared any previous relationships. His parents and one brother reside in the Czech Republic and he has one sister in Italy.
10. The applicant first came to Australia on a Student (subclass 572) visa on 8 November 2006. He was granted a further Student visa on 26 October 2009 which was valid until 7 March 2011. On 7 March 2011 his Student visa was extended to 23 April 2013. On 17 April 2013 he lodged an application for a Partner (Temporary)(Class UK) Subclass 820) visa and a Partner (Residence)(Class BS) (Subclass 801) on the grounds of being in a spousal relationship with an Australian citizen Ms Veronika Stepnickova (the sponsor).
11. The applicant's sponsor was born in Sumperk, Czech Republic on 10 June 1984. She was previously married to Trevor Johnstone in the period from 6 September 2009 to 23 April 2012. Her parents and one brother reside in the Czech Republic.
12. The parties stated they met in person on 4 January 2011 on a ferry. They committed to a long term relationship on 10 September 2011 when they commenced a de facto relationship.
13. A temporary visa (Subclass 820) was granted on 4 January 2011.
14. In the Record of Decision, a copy of which the applicant provided to the Tribunal, the delegate stated he was not able to be satisfied the relationship had progressed or that joint

financial resources had been used to support each other. The delegate stated there had been a paucity of detail provided and in that context he was not satisfied the nature of the household was that of a genuine spousal couple or that there was a commitment by the visa applicant to a long term relationship with the sponsor.

15. Prior to the hearing the applicant provided documents to the Tribunal including but not limited to the following;

- copies of bank statements for an account held in joint names for the period from 23 January 2016;
- miscellaneous dockets for groceries;
- statement from the sponsor dated 23 January 2018;
- statement from visa applicant dated 24 January 2018;
- form 888 statutory declaration by David Charles Rhodes dated 8 December 2017;
- form 888 statutory declaration by Melanie Jane Thody 30 dated 19 January 2018;
- form 888 statutory declaration by Bruce Dalby dated 23 January 2018;
- evidence of shared experiences and letters from friends addressed to both the visa applicant and the sponsor;
- photographs of the visa applicant and the sponsor at their home and in social situations with friends;
- copies of miscellaneous accounts sent to the visa applicant and the sponsor at their present address;
- a residential tenancy agreement made on 8 September 2017 in the name of the visa applicant and the sponsor for the property at 31 Ryan Place Beacon Hill and a rental ledger for that property for the period from September 2017 to December 2017;
- a residential tenancy agreement made on 28 November 2016 in the name of the visa applicant and the sponsor for the period from 16 December 2016 to 12 December 2017. This agreement covered the lower level of 31 Ryan Place Beacon Hill;
- a residential tenancy agreement made on 7 December 2015 for the period starting on 18 December 2015 and ending on 15 December 2016 in the name of the sponsor for the lower-level of 31 Ryan Place Beacon Hill;
- a residential tenancy agreement made on 18 September 2015 for the period from 18th of December 2015 and ending on 17th of December 2015 for the lower-level 31 Ryan Place Beacon Hill. This agreement was made in the name of the sponsor;
- evidence of a booked holiday in the name of the sponsor and the visa applicant for the period from 19 May 2017 to Sunday 21 May 2017;
- tax return for the sponsor for the 2017 tax year showing she declared the visa applicant is her partner;

- tax return for the visa applicant for the 2017 tax year showing he declared the sponsor as his partner;
- confirmation of the nomination of beneficiary to the visa applicants superannuation fund showing he nominated the sponsor as his sole beneficiary;
- receipt for household goods in the name of the visa applicant and the sponsor;
- extract from the certificate of birth of the visa applicant;
- death certificate for the father of the visa applicant who died 9 November 2016;
- a copy of the relationship certificate in the name of the visa applicant and the sponsor lodged under New South Wales Births, Deaths and Marriages Registration Act 1995 and dated 24 February 2017;
- bank statements in the name of the visa applicant for the period from February 2016 to April 2017;
- Copies of credit card statements for an account held in the name of the visa applicant for the period from February 2017 to March 2018;
- Advice of rental Bond lodgement in the name of the sponsor lodged 24 September 2015 and 16 October 2017;
- statements for personal loan in name of the visa applicant for the period from April 2016 to October 2017;
- MasterCard statements in the name of the visa applicant for the period from February 2016 to March 2017;
- statement of account held in the name of the sponsor for the period from March 2016 to February 2018.

16. **Tribunal Proceedings**

17. The issue in the present case is whether the applicant and her sponsoring spouse continue to be in a genuine and continuing relationship.
18. In making its findings, the Tribunal has considered the documents contained in the Department and Tribunal files as well as the oral evidence provided at the hearing by the applicant, her sponsor and the witness and the submissions received after the hearing.
19. 359AA
20. The applicant was put on notice that there was a 376 certificate on his Departmental file. A copy of that certificate was shown to the applicant and his agent and he was asked to comment on its validity. The Tribunal member explained the significance of that notice and the Tribunal view it was a valid notice.
21. Under section 359AA of the Act and in the interests of procedural fairness the Tribunal told the applicant that an unidentified person had informed the Department that the relationship between the applicant and his sponsor was a contrived relationship and that they were in fact living together as flatmates and not in a genuine and continuing relationship. It was alleged that the sponsor had been paid a sum of money to enter into the marriage with the

applicant, and that he had borrowed two amounts of \$5000 from NAB to pay the sponsor. It was further alleged the sponsor had entered into an arrangement with her first husband to obtain her permanent residency.

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23. At the time of the hearing held on 8 June 2018 the Tribunal advised the parties there were a number of inconsistencies in the evidence given at the time of hearing and these inconsistencies were put to them in accordance with section 359AA of the Act. The Tribunal explained the relevance and the consequences of relying on that information. The discrepancies were as follows:

- The parties gave conflicting evidence about how they spent their time socially and their nights out together.
- The parties gave conflicting evidence about the parties' working schedules and the impact their schedules had on their daily rituals.
- The parties gave conflicting evidence about the family of the brother of the sponsor.

24. The Tribunal gave an adjournment to allow the applicant to make submissions on the matters raised with him pursuant to the section 376 certificate on file and under section 359AA of the Act for any evidence he may wish to provide to the Tribunal.

25. The visa applicant was also given the opportunity to address those inconsistencies as outlined above. A further submission from the visa applicant was received at the Tribunal on 22 June 2018. Those submissions have been taken into account.

26. **CONSIDERATION OF CLAIMS AND EVIDENCE**

Whether the parties are in a spouse or de facto relationship

27. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

Are the parties in a de facto relationship?

28. As the parties are not validly married, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

29. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

30. *Financial*

31. At the time of hearing the applicant and the review applicant gave consistent evidence they were currently living in a two bedroom rented home and they had lived there since September 2017. They had previously resided at the same address in the downstairs section of the house for one year. They moved upstairs when offered the chance as there was an extra bedroom and more sunlight. They pay rent of \$700 per week. When they lived downstairs the rent had been \$650. The rent is inclusive of utilities. The sponsor pays the rent in cash each week. The applicant gives her \$350 each week in cash which he withdraws from a NAB account in his name. A perusal of the bank statements provided is in the main corroborative of that evidence. There was a pattern of cash withdrawal in the amount claimed (\$600) but it was somewhat irregular.
32. The applicant and the sponsor gave consistent evidence as to what the other party was earning. The sponsor told the Tribunal the applicant was employed as a community support worker. He works for the C.P. Alliance and also for Oxley Nursing Home. He is paid around \$800 per week and that is paid into the NAB joint account. The sponsor told the Tribunal she also was working as a registered nurse in the community sector. She is mainly engaged to work with people who have a disability. She said she was paid around \$1200 per week and that was paid into a Westpac account in her name. Bank statements of the accounts held in joint names and in the name of the applicant and sponsor individually were provided to the Tribunal and they were corroborative of the parties evidence of their wages being paid into the respective accounts and of the joint account being used for daily household needs such as food and petrol.
33. The Tribunal accepts on the evidence before it the parties have pooled their financial resources. The Tribunal is further satisfied that the parties have supported each other financially during periods of the relationship when one or the other was not working. The Tribunal has taken this into account when assessing whether or not the parties are in a genuine and continuing relationship.
34. There was no evidence the parties had any joint ownership of assets or any joint liabilities. There was no evidence that either party had any legal obligation to the other party.
35. The Tribunal places considerable weight on this aspect of the relationship.

36. *Nature of the Household*

37. The parties gave consistent evidence they had resided together at their present address for the past two years and had resided together since they commenced a de facto relationship in 2011. They have resided at various addresses in that time.
38. At the time of hearing the parties gave consistent evidence they share the housework. The visa applicant does the vacuuming and bath rooms and the sponsor does the floors. The visa applicant used to do the majority of the cooking but the sponsor has now learned to cook and she is cooking more often. The sponsor does the washing. The parties do a large grocery shop together each fortnight and the applicant does frequent top up shops.
39. The parties do not have any joint responsibility for the care and support of children.
40. The Tribunal accepts the parties reside as part of the one household. However the Tribunal was not convinced on the evidence the parties were living together in a genuine relationship. There was some evidence that was supportive of the finding the parties were in a genuine relationship such as the fact that the sponsor washed the clothes for both herself and the applicant. The lack of consistency in the evidence as to what nights the parties ate dinner

together was not indicative of them being in a genuine relationship, however the Tribunal does accept that their varying variable working hours could cause some confusion when seeking to recall household rituals.

41. On balance, the Tribunal was not able to distinguish on the nature of the household between one where the applicant and sponsor are living as a couple, or alternatively where the sponsor and the applicant reside together, often with other housemates, as co tenants in a shared household.

42. *Social Aspects of the relationship*

43. At the time of application the applicant and his sponsor provided relationship statements outlining the history and nature of the relationship. In material provided prior to hearing the parties provided statutory declarations attesting to the genuineness of their relationship.
44. The Tribunal accepts on the basis of the statements and the photographic evidence provided at the time of application that the parties have socialised together with members of the sponsor's family and some mutual friends. The Tribunal accepts their socialisation is often curtailed by their work schedules and more recently because of the applicant's loss of his father and his best friend.
45. After considering all the information regarding the social aspects of the parties' relationship, the Tribunal is satisfied at the time of decision their relationship is supported by their families and some friends. In weighing all of the available evidence regarding the social aspects of the parties' relationship, the Tribunal finds it is indicative of a couple in a genuine and continuing relationship.

46. *Nature of the persons' commitment to each other*

47. The Tribunal carefully considered the evidence regarding the parties commitment to their relationship and to each other. The Tribunal was mindful the parties had resided together or at the same address over a long period of time. While the Tribunal accepts there are financial incentives to sharing accommodation there are also disincentives such as the requirements to share personal space with another person. On balance the Tribunal considers that in the context of two persons residing together over seven years there has to be more than a financial advantage.
48. The Tribunal has had the advantage of being able to observe the parties together at the hearing. The parties demonstrated a reasonable knowledge of one another's lives and daily routines at the hearing. The inconsistencies in the evidence while of concern have to be considered in the context of the parties being required to answer many questions over two hearings. The parties gave consistent evidence about their future plans, including their concern as to what would happen to their cat if the visa were not granted. The Tribunal accepts Mr Kurina and Ms Stepnickova presented as being committed to a long-term relationship. The Tribunal is satisfied that they draw companionship and emotional support from one another.

49. *Conclusion on spouse/de facto criteria*

50. The Tribunal is satisfied that Mr Kurina and Ms Stepnickova have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal is satisfied that the relationship between them is genuine and continuing. The Tribunal finds that they live together and that therefore they do not live separately and apart on a permanent basis. The parties are not related by family. The Tribunal finds that the requirements of s.5CB(2) are met at the time of the application and at the time of decision.

51. Mr Kurina has turned 18 years of age and therefore satisfies the criteria in cl.820.211(2)(c). At the time of application Mr Kurina held a substantive visa and so the criteria in cl.820.211(2)(d) is not relevant.

52. The Tribunal further finds that at the time of this decision Mr Kurina continues to be Ms Stepnickova's de facto partner, and continues to meet the requirements of cl.820.211(2).

53. Therefore, Mr Kurina meets cl.820.211 and cl.820.221.

54. **Are the additional criteria for a de facto relationship met?**

55. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa.

56. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).

57. The Tribunal finds, having regard to the parties' passports, that both were at least 18 years of age at the relevant time.

58. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The Tribunal accepts on the evidence a de facto relationship commenced on 10 September 2011 and that the application for a partner visa was lodged on 17 April 2013. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.

59. For these reasons the Tribunal is satisfied that Mr Kurina meets the additional criteria prescribed in r.2.03A.

60. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

61. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.211 of Schedule 2 to the Regulations;
- cl.801.221 of Schedule 2 to the Regulations; and
- r.2.03A

Moir Brophy
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).